IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

WEDNESDAY, THE 25TH OCTOBER 2006 / 3RD KARTHIKA 1928

CRL.A.No. 475 of 2002()

CC.590/2001 of JUDL.MAGISTRATE OF FIRST CLASS, PALA

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APPELLANT: COMPLAINANT:

M.K.ANSARI, MALIKACKAL HOUSE,
NADACKAL, ERATTUPETTA, KOTTAYAM.

BY ADV. SRI.M.J.THOMAS

RESPONDENTS: ACCUSED AND STATE:

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1. M.D.THOMAS, MALLORAKOM HOUSE,
NADACKAL, ERATTUPETTA, KOTTAYAM.

2. THE STATE OF KERALA REPRESENTED BY
THE PUBLIC PROSECUTOR,HIGH COURT OF KERALA,
ERNAKULAM.

BY ADV. SRI.RAJU K.MATHEWS
PUBLIC PROSECUTOR, SRI D.ANIL KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25/10/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M.JAMES, J.

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Crl.A.No.475 of 2002 (C)

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Dated this the 25th day of October, 2006

J U D G M E N T

The complainant in C.C.No.590/2001, on the file of Judicial Magistrate of the First Class, Pala, is the appellant. He preferred a complaint under Section 138 of the Negotiable Instruments Act, in short 'the Act', against the first respondent, the accused. He examined himself as PW.1 and marked 7 documents. DW.1, the Bank Manager of S.B.T., Elappara Branch, was examined by the accused and Exhibits D1 to D2, were also marked. The learned Magistrate found that the versions given by the accused were more probable and therefore, came to a conclusion that the presumption available under Sections 118 and 139 of the Act, were rebutted. Therefore, acquitted the accused and, dismissed the complaint. Hence, this appeal.

2. While the appellant contend that Exhibit P1 cheque was issued for an amount of Rs.1,24,000/-, the accused contend that different blank signed cheques were issued to one Kamaludheen,

the then sole commission agent of M/s.Red Land Tea Factory. It is alleged by the accused that the said Kamaludheen has misused some of the cheques, issued by the accused, by presenting those signed blank cheques, through different persons, including the appellant herein. The learned Magistrate was relying on Exhibits D1 and D2, the former being the certified extract of the accounts of the factory, during 1991 to 1993 and, the latter being the copy of the cheque issue register. Exhibit D2 reveal that, a cheque book bearing cheque leaves ranging from Nos.355601 to 355650, was issued to the accused factory on 13/12/1991. Thereafter, in the year 1992, six cheque books, each book containing 25 leaves were issued. Similarly, different cheque books containing various cheque leaves, were also issued in the year 1991 and in the year 1993. The account was however, freezed in the year 1994. DW.1, explains all these facts. The learned Magistrate, relying on Exhibit D1 and Exhibit P1 cheque leaf numbers, came to the conclusion that it is improbable that Exhibit P1 cheque leaf was kept unused from 1991, till 16/09/1997.

3. The evidence available show that Exhibit P1 cheque was signed by the accused. But it does not have the seal of the factory of the accused. DW.1 had deposed that apart from the cash credit account, the accused has also got a current account. Before issuing the cheques to the account holder, in a current account, the bank would affix a seal, having the letter 'C/C'. DW.1 conceded, after perusal of Exhibit P1, that the 'C/C' seal is seen affixed in Exhibit P1. I have perused Exhibit P1 cheque and found that what DW.1 deposed is correct.

4. Except examining the DW.1, the Branch Manager of the bank, the said Kamaludheen, who was the sole agent for selling of the tea of the accused, was not sighted and examined. Merely, because Exhibit P1 cheque leaf contains a number and date which would not come within the period during which the cheque leaves preceding or succeeding, have been encashed, do not enable the accused to contend that such a cheque leaf was not issued as claimed by the complainant. It is for the accused to enter the box and explain the circumstances under which Exhibit P1 cheque leaf came to the possession of

the appellant, complainant. Neither Kamaludheen was sighted and examined, nor the accused entered the box and explained the circumstances under which Exhibit P1 cheque came to the possession of the appellant. Therefore, I am unable to agree with the conclusions arrived at by the learned Magistrate.

5. It is true that in the case of an acquittal, the trial court has got advantage of seeing the parties in action, but in appeal, the appellate court has to reappreciate the entire evidence placed before it. When the complainant establishes that the cheque has been issued for clearance of a debt due to him and the cheque was dishonoured, it is for the accused to disprove the claim.

6. In the case at hand, the ingredients required to be established as per Section 138 of the Act, has been proved by the complainant. It is for the accused to rebut the presumption available in favour of the complainant. I agree with the legal principle that the rebuttal evidence could be drawn from the facts, circumstances and materials available in the evidence. But on appreciation of the evidence on record, I am unable to

conclude that the same are sufficient to conclude that the accused have rebutted the presumptions available as per the law.

7. In view of the above discussions, it would be more appropriate that an opportunity be given to the parties to adduce fresh evidence. The accused may also adduce evidence rebutting the presumptions, that is available in favour of the complainant, the appellant. For the said purpose, I set aside the impugned judgment of the learned Magistrate and restore C.C.No.590/2001, to the file of Judicial Magistrate of the First Class, Pala.

8. The parties shall appear before the court below on 27/11/2006. The learned Magistrate shall allow the parties to adduce additional evidence, if they are so advised and, thereafter, it shall appreciate the same and pass appropriate orders, on merit, untrammeled by the observations contained in this judgment.

9. The cheque being of the year 1997, and the case being of the year 2001, the learned Magistrate shall give priority

for the disposal of the same and, in any case, the disposal shall be within three months from the date of appearance of the parties before that court.

(J.M.JAMES)
Judge

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J.M.JAMES, J.

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Crl.A.No.475 of 2002

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J U D G M E N T

25th October, 2006